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No. 779

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

INDEPENDENT MILITARY AIR TRANSPORT ASSOCIATION,
Petitioner,

v.

AMERICAN AIRLINES, INC., ET AL., and
NATIONAL AIRLINES, INC., ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Dated: February 16, 1957
Washington, D. C.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

To the Honorable The Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your Petitioner, Independent Military Air Transport Association, respectfully prays that a writ of

certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above entitled cause.

OPINION BELOW

The Opinion of the Court below (Appendix A, *infra*, pp. 1a-17a) is officially reported at 235 F. 2d 845.

JURISDICTION

The judgment of the Court of Appeals was entered on July 19, 1956. Orders denying petitions for rehearing were entered on September 19, 1956. The jurisdiction of this Court is invoked under 28 USC 1254 (1) and 47 USC 402 (J).

QUESTIONS PRESENTED

1. Whether the Civil Aeronautics Board exceeded its statutory powers under Section 416 (b) of the Act (Civil Aeronautics Act of 1938, as amended, 49 USC 496 (b)) in exempting from the Certificate requirements of Section 401 (49 USC 481) some 49 carriers to perform the air transportation services permitted on an interim basis pending final decision with respect to their applications for Certificates of Public Convenience and Necessity.

2. Whether the Civil Aeronautics Board, in the Opinion and Order under review, made sufficient findings, as a matter of law, to support the conclusion that enforcement of the Certificate requirements of the Act would be an undue burden by reason of the limited extent of or unusual circumstances affecting the operations of the exemptees and not in the public interest.

3. Whether the Court below should have withheld action in the case until Petitioners below demonstrated that they had exhausted their administrative remedies.

STATUTE INVOLVED

The statute involved is the Civil Aeronautics Act of 1938, 52 Stat. 973, *et seq.*, 49 USC 401 *et seq.*, the pertinent provisions of which are set forth in Appendix B, *infra*. Particularly involved is Section 416 (b) (1) of said Act which is set forth in Appendix B at page .

STATEMENT

This Petition seeks review of the judgment of the United States Court of Appeals for the District of Columbia whereby it reversed the Opinion and Order of the Civil Aeronautics Board granting to members of your Petitioner's Association certain enlarged operating rights in air transportation pending final decision with respect to the applications of such members for Certificates of Public Convenience & Necessity.

Your Petitioner is an Association of air carriers composed principally of Supplemental Air Carriers (formerly known as Irregular Air Carriers). The Court below granted your Petitioner leave to intervene in the proceeding by Order dated January 23, 1956.

The proceeding sought to be reviewed by this Honorable Court arose on September 21, 1951 as a result of an Order by the Civil Aeronautics Board instituting a general investigation to determine what place, if any, the so-called Irregular Air Carriers should have in the field of air transportation.

Since the Civil Aeronautics Act became law in 1938, Irregular Air Carriers had been permitted by exemption order of the Civil Aeronautics Board to engage in air transportation on an irregular or "non-scheduled" basis. Although the term "irregular" or "non-scheduled" was never precisely defined by the Civil Aeronautics Board, it was generally conceded that such carriers could operate between 8 and 12 flights per month on an individually ticketed basis under regulations which had been in effect for many years. These flights, however, had to be operated on an irregular or infrequent basis and, indeed, the precise number of flights which a carrier could operate during a given period of time was not known to any of the carriers.

At the end of World War II, numerous war-trained pilots sought to enter the field of air transportation by establishing their own independent airlines. Accordingly, in 1947 the Civil Aeronautics Board revised its exemption regulation (12 Fed. Reg. 3076, 14 CFR 292.1) to require Letters of Registration as a condition precedent to operations and to distinguish between operators of transport-type aircraft (large irregular carriers) and operators of small aircraft (small irregular carriers).[1] 142 large irregular carriers were issued Letters of Registration pursuant to the 1947 regulation.

In 1949 the Civil Aeronautics Board again revised the regulations (14 CFR 291) terminating the blanket exemption authority under the 1947 regulations and

[1] The latter carriers now known as air taxi operators are permitted to engage in unlimited operations on a scheduled basis using aircraft with a gross take-off weight of no more than 12,500 pounds. (i.e., capacity of transporting about 8 passengers) (14 CFR 298).

requiring large irregular carriers to apply for individual exemption authority. 97 of the 142 holders of Letters of Registration issued under the 1947 regulation filed applications for individual exemption authority. These applicants were permitted to continue to operate pending final disposition of their applications for exemption authority (TR. 48585). The Order of the Civil Aeronautics Board of September 21, 1951 consolidated in the proceeding these applications for individual exemption authority together with applications for Certificates of Public Convenience and Necessity filed by the applicants. (TR. 42494, 48586).

The applicants in the proceeding before the Civil Aeronautics Board (known as the *Irregular Air Carrier Investigation*, Docket 5132, *et al.*) for the most part, sought authority to engage in unlimited charter operations plus 14 flights per month between any two points on individually ticketed or waybilled flights. (TR. 48649-48656).

The Petitioners below are holders of Certificates of Public Convenience and Necessity (e.g., American Airlines, Inc.) authorizing unlimited, scheduled air transportation of persons, property and mail over fixed routes. These carriers opposed the continuation of the then-existing rights of the irregular air carriers to engage in individually ticketed or waybilled flights.

After nearly four years of hearings (during which time a record of over 50,000 pages was built) the Civil Aeronautics Board on November 15, 1955 issued its Opinion in the *Large Irregular Air Carrier Investigation*, Docket 5132, *et al.* In this Opinion the Civil Aeronautics Board reclassified the large irregular air

carriers as "Supplemental Air Carriers" and granted to each member of the class the authority to: (1) operate up to ten (10) individually ticketed or way-billed flights per month between the same pair of points without regard to regularity, and (2) engage in an unlimited number of charter flights where the entire capacity of the aircraft is utilized by a single person (except ticket agents, etc.) (TR. 48550, 48552, 48565, 48590, 48591 and 48688). The ten (10) flight authorization was a substitute for the prior authorization whereby there was no precise numerical limitation on flights, but where from 8 to 12 flights could be operated between the same points. The authority to operate charter flights (except with ticket agencies, etc.) was made unlimited whereas under the old regulations, charter flights were counted in determining "regularity".

Throughout its decision, the Civil Aeronautics Board repeatedly emphasized the fact that the authority granted was on a temporary or interim basis pending final decision with reference to the applicants' petitions for Certificates of Public Convenience and Necessity.

The Civil Aeronautics Board unanimously approved the granting of unlimited charter rights to the applicants but the Board split 3 to 2 on the question of whether the applicants should be authorized to operate the 10 individually ticketed flights, the latter having been vigorously opposed by the Petitioners below. The Board also reserved jurisdiction over the case for the purpose of further reducing the number of permissible individually ticketed flights on an expedited basis in the event the 10 flights should prove

unduly competitive with the established services of the certificated air carriers.

The Court below did not consider the record built up in the hearings before the Civil Aeronautics Board but reversed the Board on the grounds that the authority granted the applicants was a permanent authorization and that the Board had not "as a matter of law" made sufficient findings of fact to justify the conclusion that the granting of Certificates of Public Convenience and Necessity to the applicants would be an undue burden because of the limited extent or unusual circumstances surrounding their operations and not in the public interest.

REASONS FOR GRANTING THE WRIT

The United States Court of Appeals for the District of Columbia Circuit had decided an important question of Federal law which has not been, but should be, settled by this Court. Specifically, the decision of the Court below severely restricted the powers heretofore exercised by the Civil Aeronautics Board pursuant to Section 416 (b) (1) of the Act to develop air transportation in the public interest and in the interests of National Defense. The Opinion of the Court below also overrules 18 years' of consistent administrative interpretation of Section 416 (b) (1) by the Civil Aeronautics Board which interpretation has been consistently upheld by the Circuit Courts.

Pursuant to Section 2 of the Civil Aeronautics Act (see Appendix page 17a) it is the duty of the Civil Aeronautics Board to foster the development of air transportation to the maximum possible extent in the public interest and in the interest of National Defense. Since World War II the Board has made extensive

use of its exemption powers in order to foster the development of new or experimental types of air transportation services. Following are a few examples:

A. On May 5, 1947 the Civil Aeronautics Board adopted Section 292.5 of the Economic Regulations which created a class of carriers engaged exclusively in the transportation of air freight and permitted these carriers to engage in unlimited, scheduled cargo operation over all the principal airline routes in the United States until such time as the Board could pass upon their applications for Certificates of Public Convenience and Necessity which were pending at that time. This was the fundamental regulation which brought into being the air freight carriers as a significant part of the air transportation industry. In commenting upon Section 292.5 of the Economic Regulations (later recodified as Part 295) CAB Member Gurney, formerly Chairman of the Civil Aeronautics Board (and one of the dissenting Members herein) testified before the Senate Committee on Interstate and Foreign Commerce on S-2647 as follows:

> "In addition to making provision for supplemental service, the Board has used its exemption authority under Section 416 (b) of the Civil Aeronautics Act of 1938 for development purposes. Thus, as indicated a few moments ago, the authority was used to authorize the initial experiment of the all-freight carriers.
>
> "Part 295 of the Board's Economic Regulations, adopted in 1947, opened the way for experimental scheduled all-freight services by certain noncertificated carriers. After the experience of 2 or 3 years, some of these carriers were duly certificated and now hold certificates of public

convenience and necessity, authorizing them to engage in freight-only operations.

"It is quite probable that had not the services been tested by means of an experimental period, there might not have been sufficient evidence to warrant a finding of public convenience and necessity for this type of operation.

"A second type of experimental authorization under the present Board powers related to an all-expense tour operator. Successful operations, pursuant to an exemption order, led to the subsequent issuance of the certificate of public convenience and necessity."

The Board's decision granting Certificates of Public Convenience and Necessity to a number of these cargo carriers was appealed to the United States Court of Appeals for the District of Columbia Circuit by substantially the same carriers which appealed the instant decision of the Board and substantially the same arguments were advanced to the effect that the Board had disregarded its statutory functions and made inadequate findings or findings not supported by substantial evidence. The Board's opinion was unanimously affirmed by the Circuit Court. *American Airlines, Inc., et al.* v. *Civil Aeronautics Board,* 192 F. 2d 417 (1951).

The instant proceeding is exactly parallel to the case which gave birth to the air freight carriers. In the instant proceeding the Board found that the irregular (Supplemental) air carriers might reasonably suffer severe financial reverses under the then-existing regulations; that these carriers had made substantial contributions to air transportation (particularly in providing low cost "coach service" and

contract operations for the Military Establishment) and that such carriers should be preserved as an operating group in the public interest and in the interest of National Defense pending final determination of their applications for Certificates of Public Convenience and Necessity. For all practical purposes, the same findings were made with reference to the air freight carriers and, as pointed out by Member Gurney, "it is quite probable that, had not the services been tested by means of an experimental period, there might not have been sufficient evidence to warrant a finding of public convenience and necessity for this type of operation."

B. On July 1, 1949, the Board adopted Section 292.6 (now Part 296) of the Economic Regulations and thereby established a classification of indirect air carriers known as air freight forwarders. These carriers, like the freight carriers, were exempted from most of the provisions of Title IV of the Civil Aeronautics Act, including the Certificate provisions of Section 401 (a). This decision by the Board, like the *Air Freight Case,* was appealed by substantially the same carriers and the principal contention was again that the Board had exceeded its statutory authority. The Board's opinion was unanimously affirmed by the United States Court of Appeals for the Seventh Circuit. *American Airlines, Inc., et al.* v. *C. A. B.,* 178 F. 2d 903 (1949).

C. On April 24, 1950, the Board adopted Part 297 of the Economic Regulations (15 FR 1866) and thereby created a class of carriers known as international air freight forwarders, which, like the domestic air freight forwarders, were granted exemp-

tion from most of the provisions of Title IV of the Act including the Certificate provisions of Section 401 (a).

D. On February 20, 1952, the Board adopted Part 298 of the Economic Regulations (17 FR 635) and thereby created a classification of air carriers known as air taxi operators. These carriers, like the air freight carriers and the air freight forwarders, were granted exemption from most of the provisions of Title IV including the Certificate requirements of Section 401 (a).

E. The use by the Board of its exemption powers under Section 416 (b) for the development of air transportation has by no means been limited to the period since World War II. Thus, as early as December 7, 1938, the Board adopted Regulation 400-1 which created the non-scheduled air carriers and exempted them from the provisions of Section 401 and practically all the other provisions of Title IV. In 1938 and 1939 the Board granted exemptions from the provisions of Section 401 (a) of the Act to a number of carriers and thereby authorized them to engage in unlimited scheduled operations in air transportation of mail, passengers and property over a number of specific routes over which the statute required the discontinuance of service pending granting of Certificates.

Pennsylvania Central Airline Corporation was authorized by exemption from the provisions of Section 401 (a) to render air transportation service "over the route between Detroit, Michigan and Sault Ste. Marie, Michigan via intermediate cities" for all classes of traffic for which authorization was sought until an application for certificate filed by such carrier could be acted on. This exemption covered a period from

June 23, 1938 to and including 120 days thereafter and beyond the 120-day period, provided only that application for certificate was filed within a period of 120 days after June 23, 1938.[2]

National Airlines was similarly authorized to engage in air transportation of mail in addition to persons and property "over the route between Jacksonville, Florida and New Orleans, Louisiana via Tallahassee, Marianna, Pensacola, Florida, Mobile, Alabama and Gulfport, Mississippi", pending action on its application for certificate authorization to serve that route.[3]

Eastern Air Lines was granted similar exemption authorizations with respect to transportation of mail, persons and property "over a route from Tampa, Florida, to Tallahassee, Florida, and from Tallahassee, Florida to Memphis, Tennessee" via intermediate points and from Tallahassee, Florida to Atlanta, Georgia via Albany, Georgia; and "over a route from Houston, Texas to Brownsville, Texas and from Houston, Texas to San Antonio, Texas."[4] As the Board stated in its Opinion granting Eastern its grandfather certificate:

> "On and before that date (June 23, 1938) the applicant was not engaged in air transportation to any point on air mail routes Nos. 40 and 42.

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[2] Special Order 401-A-1; Pennsylvania Central was awarded a Post Office contract for this route on June 25, 1938 and its operations were not instituted until July 20, 1938. The statutory provisions of Section 401 (a) of the Act would have required the discontinuance of service on August 22, 1938 in the absence of the foregoing exemption authorization. 1 CAA 66, 70 (1939).

[3] Special Order 401-A-6.

[4] Special Order 401-A-7 and Special Order 401-A-8.

Therefore, applicant was prohibited by the act from engaging in air transportation on such routes until certificates authorizing such transportation should be issued. In order to enable the applicant to commence operations on these routes prior to the issuance of any certificates for the routes, the Authority, pursuant to the provisions of Section 416 (b) of the Act, on October 10, 1938, promulgated Special Order 401-A-7 and Special Order 401-A-8 exempting applicant from the provisions of Section 401 (a) of the Act with respect to the commencement of operation on air mail routes Nos. 40 and 42, respectively, until such time as the Authority shall issue certificates of public convenience and necessity for the air transportation service over such routes of applicant, or shall issue its final order denying the application of the applicant for such certificates.'[5] (Emphasis supplied).

Braniff was given similar exemption authorization over a route between Dallas, Texas and San Antonio, Texas via Waco and Austin.[6]

In none of the above cases did the Board ever make any findings as extensive as those which were made in the instant proceeding. Indeed, in the great majority of the above cases, the Board simply recited the statutory findings required by Section 416 (b) (1) without any discussion of the subsidiary reasons for the granting of the exemption orders. In striking contrast to practically all of the above proceedings, the Board in the instant case made the following principal findings:

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[5] 1 CAA 173, 179 (1939).

[6] Special Order 401-A-9.

1. That the granting of the exception order was necessary in order to preserve the carriers in the public interest (Tr. 48540, 48541, 48550, 48558, 48630, 49199, and 49204).

2. That the preservation of the carriers is important in the interests of national defense (Tr. 48541, 48550).

3. That the carriers had experienced a steady worsening in position in terms of dwindling revenues, resources, and number of carriers under previous regulations and that more liberal regulations were necessary to preserve the carriers (Tr. 48536, 48585, 48598-99, 49198, and 49199).

4. That the carriers are small in relation to overall financial resources and revenues derived by the entire aviation industry (Tr. 4865-77).

5. That the authority granted the small carriers would not have any serious adverse competitive impact upon the large certificated airlines (Tr. 48551, 48554, 48555, 48557, 48558, 49202, 49203).

6. That the ability of the carriers to operate their aircraft in the interest of national defense depends in large measure upon their commercial activities (Tr. 48541, 48550).

7. That insufficient coach service has been provided by the large certificated carriers and the existence of the small carriers is necessary to accommodate peak traffic demands (Tr. 48634, 48683-85, 49201).

8. That the carriers have been forced to operate under serious competitive disadvantages (Tr. 48626, 48634).

9. That there is a public need for the services of the carriers in order to develop new and different services and demands (Tr. 49196-97, 49203-04).

The above are merely a few of the more important subsidiary findings. In addition, the Board, of course, made the statutory finding required by Section 416 of the Civil Aeronautics Act to the effect that the enforcement of the certificate provisions contained in Section 401(a) of the Act would be an undue burden upon the carriers by reason of the limited extent of or unusual circumstances affecting their operations and would not be in the public interest.

F. The large certificated air carriers (the petitioners below) did not either in the United States Court of Appeals or before the Board raise any serious objections to the authority granted the supplemental carriers to engage in unlimited charter operations. The petitioners below did, however, object to the authority granted the supplemental carriers to operate up to 10 (ten) trips per month on an individually ticketed or individually waybilled basis.

Admittedly it was impossible for the Board to forecast with mathematical exactness what competitive impact, if any, the 10-flight per month authorization would have upon the certificated airline industry. This is a matter about which reasonable persons may disagree, as witnessed by the fact that the Board itself was split three to two on the issue. The Board, therefore, specifically retained jurisdiction in the case for the purpose of further limiting the number of permissible individually ticketed flights in the event that practical experience showed that the 10-flight limitation should prove unduly competitive upon the certificated airlines. The Board stated:

> "If in actual practice it should develop that the amount of service offered under the 10-flight provision proves excessive in terms of its impact upon

> the certificated route structure, we should be free to make the necessary adjustments to that provision and to do so promptly. For that reason, we are expressly reserving the power to make downward adjustments in the 10-flight provision and to do so on an expedited basis if circumstances so require."

The law is well settled that where a Government agency has authority to pass upon the question raised by a petitioner in a judicial proceeding and the agency is able to modify the order under attack, the Court should withhold its aid entirely until administrative remedies have been exhausted. *Natural Gas Pipe Line Co.* v. *Slattery,* 302 U.S. 300, 82 L. ed. 276, 58 S. Ct. 199. The Court below, however, refused to pass upon this important question and, indeed, made no mention thereof in its opinion.

CONCLUSION

The Court below has decided an important question of administrative law which has not but should be passed upon by this Honorable Court. Specifically, the Court below has ruled that pursuant to Section 416(b) of the Civil Aeronautics Act, the Civil Aeronautics Board has no authority to grant supplemental operating rights to a number of small airlines whose existence the Board has found to be essential in the public interest and in the interests of national defense. Moreover, the opinion of the Court below overrules eighteen years of administrative interpretation of Section 416(b) of the Civil Aeronautics Act, which interpretation has consistently been upheld by the various circuit courts but has not yet been passed upon by this Court. The findings of the Civil Aeronautics Board in the case are set forth in detail in an elaborate

opinion and supplemental opinion on reconsideration. The detailed findings of the Board are, in turn, supported by a record totalling over 50,000 pages, which has been built up during proceedings lasting nearly four years. If the opinion of the Court below is not reversed, there is grave danger that the supplemental air carriers which have made substantial contributions to air transportation and to the interests of national defense will cease to exist.

WHEREFORE, it is respectfully prayed that this Honorable Court issue a Writ of Certiorari to the Court below.

Respectfully submitted,

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Dated: February 16, 1957

Proof of Service

I, Coates Lear, one of the attorneys for the Independent Military Air Transport Association, Intervenor herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on February 16, 1957, I served a copy of the foregoing Petition for Writ of Certiorari upon the persons listed below by mailing copies, in duly addressed envelopes, with first class postage prepaid, as follows:

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APPENDIX

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13044

AMERICAN AIRLINES, INC., PETITIONER
NATIONAL AIRLINES, INC., INTERVENOR

v.

CIVIL AERONAUTICS BOARD, RESPONDENT
CAPITOL AIRWAYS, INC., QUAKER CITY AIRWAYS, INC.,
AIRCOACH TRANSPORT ASSOCIATION, and INDEPENDENT
MILITARY AIR TRANSPORT ASSOCIATION, INTERVENORS

No. 13045

TRANS WORLD AIRLINES, INC., PETITIONER

v.

CIVIL AERONAUTICS BOARD, RESPONDENT

No. 13048

EASTERN AIR LINES, INC., PETITIONER

v.

CIVIL AERONAUTICS BOARD, RESPONDENT

No. 13052

PAN AMERICAN WORLD AIRWAYS, INC., PETITIONER

v.

CIVIL AERONAUTICS BOARD, RESPONDENT

No. 13054

DELTA AIR LINES, INC., PETITIONER

v.

CIVIL AERONAUTICS BOARD, RESPONDENT

No. 13061

UNITED AIR LINES, INC., PETITIONER

v.

CIVIL AERONAUTICS BOARD, RESPONDENT

No. 13063

CONTINENTAL AIR LINES, INC., PETITIONER

v.

CIVIL AERONAUTICS BOARD, RESPONDENT

No. 13064

NORTHWEST AIR LINES, INC., PETITIONER

v.

CIVIL AERONAUTICS BOARD, RESPONDENT

No. 13068

ALLEGHENY AIRLINES, INC., et al., PETITIONERS

v.

CIVIL AERONAUTICS BOARD, RESPONDENT

No. 13116

WESTERN AIR LINES, INC., PETITIONER

v.

CIVIL AERONAUTICS BOARD, RESPONDENT

No. 13117

CAPITAL AIRLINES, INC., PETITIONER

v.

CIVIL AERONAUTICS BOARD, RESPONDENT

No. 13118

BRANIFF AIRWAYS, INC., PETITIONER

v.

CIVIL AERONAUTICS BOARD, RESPONDENT

No. 13120

PACIFIC NORTHERN AIRLINES, INC., PETITIONER

v.

CIVIL AERONAUTICS BOARD, RESPONDENT

No. 13121

ABILENE & SOUTHERN RAILWAY COMPANY, et al., PETITIONERS

v.

CIVIL AERONAUTICS BOARD, RESPONDENT

On Petitions for Review of Order of the Civil Aeronautics Board

Decided July 19, 1956

Mr. Howard C. Westwood, with whom *Mr. Clifton J. Stratton, Jr.,* was on the brief for petitioner in No. 13044, argued for all petitioners and for intervenor National Airlines, Inc., in No. 13044. *Mr. Richard A. Fitzgerald* was on the brief for intervenor National Airlines, Inc., in No. 13044.

Mr. John F. Floberg for petitioners in No. 13068. *Mr. Edward DeGrazia* also entered an appearance for petitioners in No. 13068.

Mr. J. D. Feeney, Jr., with whom *Messrs. Amos M. Mathews* and *Thormund A. Miller* were on the brief, for petitioners in No. 13121.

Mr. James K. Crimmins was on the brief for petitioner in No. 13045. *Mr. William Caverly* also entered an appearance for petitioner in No. 13045. *Mr. W. Glen Harlan* was on the brief for petitioner in No. 13048. *Messrs. Henry J. Friendly, Robert C. Barnard* and *Leon Lipson* were on the brief for petitioner in No. 13052. *Messrs. L. Welch Pogue* and *James F. Bell* were on the brief for petitioner in No. 13054. *Mr. Robert L. Stern* was on the brief for petitioner in No. 13061. *Mr. James Francis Reilly* entered an appearance for petitioner in No. 13061. *Messrs. C. Edward Leasure* and *Herman F. Scheurer, Jr.,* were on the brief for petitioners in Nos. 13063 and 13064. *Messrs. L. Welch Pogue* and *James W. Callison* were on the brief for petitioner in No. 13116. *Messrs. Robert B. Hankins* and *Macon M. Arthur* were on the brief for petitioner in No. 13117. *Messrs. Hubert A. Schneider* and *B. Howell Hill* were on the brief for petitioner in No. 13118. *Mr. Gerald P. O'Grady* was on the brief for petitioner in No. 13120.

Mr. O. D. Ozment, Chief, Litigation and Research Division, Civil Aeronautics Board, with whom *Mr. Franklin M. Stone,* General Counsel, Civil Aeronautics Board, *Mr. John H. Wanner,* Associate General Counsel, Civil Aeronautics Board, *Messrs. Robert L. Park, Gerald F. Krassa* and *Henry M. Switkay,* Attorneys, Civil Aeronautics Board, and *Mr. Daniel M. Friedman,* Attorney, Department of Justice, were on the brief, for respondent.

Mr. Albert F. Beitel, with whom *Mr. John H. Pratt* was on the brief, for intervenor Aircoach Transport Association, in No. 13044. *Messrs. Albert F. Beitel* and *John H. Pratt* entered appearances for intervenor Quaker City Airways, Inc., in No. 13044.

Mr. Coates Lear, with whom *Mr. Theodore I. Seamon* was on the brief, for intervenor Independent Military Air Transport Association, in No. 13044. *Messrs. Coates Lear and Theodore I. Seamon* entered appearances for intervenor Capitol Airways, Inc., in No. 13044.

Before PRETTYMAN, WILBUR K. MILLER, and FAHY, Circuit Judges.

PRETTYMAN, *Circuit Judge:* These are petitions to review an order of the Civil Aeronautics Board.[1] This order is the latest in a long series dealing with the problem of the non-scheduled or irregular air carriers. Petitioners are the certificated air carriers and certain railroads. The intervenors in behalf of the respondent are associations of irregular carriers. The respondent, of course, is the Civil Aeronautics Board. It is unnecessary to recite here the background of the present controversy. It appears in its various stages in a long line of cases before this court and before the Board.[2]

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[1] Order E-9744. Technically, a subsequent order, E-9884, denying reconsideration of the first order, is also involved.

[2] See, *e.g.,* Air Transport Associates v. Civil Aeronautics Board, 91 U.S. App. D.C. 147, 199 F.2d 181 (1952), *cert. denied,* 344 U.S. 922, 97 L.Ed. 710, 73 S.Ct. 386 (1953); American Air Transport

The basic requirement heretofore imposed upon the irregular carriers by the Board has been that they operate without any reasonable semblance of regularity as to schedule or route. The basic change wrought by the present order is to remove this requirement of irregularity and to substitute in its place a maximum limitation upon the number of round trips permitted per month between any two points. The Board accomplishes this objective by granting these carriers an exemption under Section 416(b) of the Act.[3] The petitioners contest the validity of the order, so far as the present argument is concerned,[4] upon three basic grounds: (1) that the Act grants the Board no power to issue such an order; (2) that the order is not supported by the findings required by the statute; and (3) that the order is beyond the scope of the proceeding.

In 1951 the Board instituted a proceeding to determine its future policy with regard to Large Irregular Air Carriers.[5] Some sixty-six applicants were involved. Two examiners began hearings, in which not only the general problem was involved but the individual qualifications of the several applicants were treated as issues. Testimony as to about half of the applicants had been

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v. Civil Aeronautics Board, 92 U.S. App. D.C. 117, 206 F.2d 423 (1953); Eastern Airlines v. Civil Aeronautics Board, 87 U.S. App. D.C. 331, 185 F.2d 426 (1950), *vacated*, 341 U.S. 901, 95 L.Ed. 1341, 71 S.Ct. 613 (1951); New England Air Express v. Civil Aeronautics Board, 90 U.S. App. D.C. 215, 194 F.2d 894 (1952); Large Irregular Carriers, Exemptions, 11 C.A.B. 609 (1950).

[3] 52 STAT. 1004 (1938), as amended, 49 U.S.C.A. § 496(b).

[4] The petitions for review presented, generally speaking, issues of law and also issues requiring examination of the evidentiary record. This record totaled fifty thousand pages. By a prehearing order under Rule 38(k) of the Rules of this Court, the court ordered that the issues of law be briefed, argued and decided and that pending such disposition the evidentiary issues be reserved.

[5] The proceeding was known as The Large Irregular Air Carrier Investigation, Docket No. 5132.

presented when the Board deferred further hearing on such qualifications and directed that the proceeding go forward upon the general questions. The examiners presented an initial decision. Exceptions to it were filed, and oral argument was held before the Board. A majority rendered a long opinion and an order. Two members dissented. In the order the Board recited that the enforcement of the certification provisions of the Act (Sections 401(a),[6] 404(a)[7] and 405(e)[8]) would be an undue burden on the carriers by reason of the limited extent of, and the unusual circumstances affecting, the operations of such carriers. It ordered that forty-nine of the applicants (naming them) be temporarily exempted from the certification requirements, subject to certain terms, and that each be issued an "Interim Operating Authorization" to terminate sixty days after the Board should dispose of the several individual applications for exemption authority. The terms attached to the order were long and in some detail. The principal one was that the carrier not engage in more than ten flights in the same direction between any single pair of points in any calendar month. In respect to this condition the Board said in its order:

> "Whenever, in the judgment of the Board, there is reason to believe that the foregoing ten flight limitation is insufficient to confine the operations of supplemental air carriers as a class to the rendition of the supplemental services for which they are authorized, and that the operations of such carriers pose a substantial threat to the stability and soundness of the certificated air carrier system, the Board may at any time reopen the proceeding and, after notice and opportunity for argument and with or without additional evidentiary hearing, make such downward adjustments in the maximum flight limita-

[6] 52 STAT. 987 (1938), as amended, 49 U.S.C.A. § 481(a).

[7] 52 STAT. 993 (1938), as amended, 49 U.S.C.A. § 484(a).

[8] 52 STAT. 995 (1938), as amended, 49 U.S.C.A. § 485(e).

> tion as the Board may deem necessary or desirable. The interim operating authorizations granted by this order are herein expressly conditioned upon and subject to the reserved right of the Board to make further limitations, restrictions or modifications of the ten flight limitation, including a reduction in the number of such flights, to insure that the services remain supplemental."

The opinion of the Board makes clear that the ten flights per month may be conducted upon the basis of a regular schedule. The opinion also makes clear that the Board contemplated that these air carriers could offer unlimited charter operations on a plane-load basis in domestic carriage.

The reasoning of the Board may be summarized. It found that the services performed by the irregular carriers, including charter operations, individually ticketed coach flights, specialized services, and military air-lift, have proven of importance to both the irregular carriers and the public, meeting real needs. It concluded that its policy should be directed toward their survival and healthy growth. It determined that the services rendered by the irregular carriers could not be rendered satisfactorily by the presently certificated carriers, which have fixed commitments to route and schedule operation. It found that the elimination of the restriction against regularity would help the public and strengthen the supplemental carriers, and that it would aid in the administration and enforcement of regulations. The Board emphasized that it selected the number ten as the number of permissible trips by taking into account on an average basis the number of permissible trips which might be operated by these carriers under heretofore existing regulations.

The Board turned its particular attention to the suggestion that the new scope of supplemental operations would open the door to unlimited competition which would affect adversely the certificated carriers. It held

that the hard facts of economic realism would operate against such a situation, reciting in detail the considerations which led to this conclusion. It said it would not permit the supplemental carriers to combine and integrate their operations. It said it would "underscore for all concerned" that the supplemental carriers are to be restricted to needs they are designed to meet and that if they posed a threat to the certificated system "they must face up to a prompt and effective diminution in the maximum permissible flight frequencies."

The Board made a comparatively brief recital in respect to the undue burden upon the applicants and the unusual circumstances affecting their operations, a matter which we shall discuss in detail hereinafter. The Board reserved decision as to the nature and form of the authority to be granted for the supplemental air transportation it contemplated until the completion of the hearings upon the qualifications of the individual applicants, in the meantime issuing temporary authorization.

Petitioners vigorously attack the order upon the ground that it is not authorized by the statute. Section 416(b)(1) reads as follows:

> "The Board, from time to time and to the extent necessary, may (except as provided in paragraph (2) of this subsection) exempt from the requirements of this title or any provision thereof, or any rule, regulation, term, condition, or limitation prescribed thereunder, any air carrier or class of air carriers, if it finds that the enforcement of this title or such provision, or such rule, regulation, term, condition, or limitation is or would be an undue burden on such air carrier or class of air carriers by reason of the limited extent of, or unusual circumstances affecting, the operations of such air carrier or class of air carriers and is not in the public interest."

It is clear that the foregoing provision has two basic parts. In the first place, in broad language, it empowers

the Board to exempt any class of carriers from "any provision" of the statute or "any rule, regulation, term, condition, or limitation prescribed thereunder." This is sweeping language. The second basic provision in the paragraph is that in order to exert this broad power of exemption the Board must find that enforcement of the statutory provision is or would be "an undue burden" on the class of carriers by reason of the limited extent of, or unusual circumstances affecting, the operation of such carriers. The Board must further find that enforcement of the provision is not in the public interest.

This first point of petitioners is that the Board has no authority to issue this order as an exemption order with or without findings such as the ones described in the last clause of the quoted section. They say the order, in and of itself, is outside the scope of the quoted exemption section. The order, they say, represents something the Board cannot do by exemption. Although, as will develop, we think another contention dispositive of this proceeding, a ruling upon that other contention alone would leave the controversy in a wholly unsettled state. The parties have briefed and argued the point now before us, and we shall dispose of it. To treat it we must assume *arguendo* that valid findings as to undue burden and public interest are made.

The petitioners urge that the basic concept of the statute enacted by the Congress for the regulation of the air industry is of a certificated system. Section 401(a) specifically requires that no air carrier shall engage in any air transportation unless there is in force a certificate issued by the Board. Various subsections, notably, *inter alia*, (d), (f) and (k) of Section 401, make provisions respecting certificates and certificated carriers. Petitioners say Congress did not intend that the Board might, by the use of the exemption provision of Section 416(b), destroy the elaborate basic requirements of the Act for a certificated system of airplane carriage. The

petitioners are quite correct in that contion. Despite the broad language of Section 416(b) we ink it is perfectly clear that the Congress did not set so elaborate a series of provisions in respect to the rtification of carriers, and the public interest, convenie and necessity therein involved, and at the some tingrant its administrative agency power to destroy se elaborate provisions. We think there is and must a boundary to the authority of the Board under its emption power to impinge upon the certificated service.

But the Board does not disagree withhe foregoing. Its position is that a sound national tranportation system requires, from the standpoints bothf the normal traveling public and of the national defse, a service supplemental to that which is and can rendered by carriers certificated to routes, schedules d services. It declares that the proposed supplementarriage must not in the aggregate jeopardize the cerficated carrier system. It says that the main and basitransportation system must be a certificated system but at in addition there must be a supplemental service. Inot only thus declares its position but, as we have sn, it inserted both in its opinion and in its order a scific provision that, if experience should show that t supplemental operation poses a substantial threat tohe certificated system, adjustments will be made to prent that result. The position of the Board is a rationame. There is undoubtedly a demand for charter servi and for extra ticketed service in times of peak demanc If there is to be supplemental service rendered, it see rational that supplemental carriers, devoted entirely toat task, should be authorized to operate. We accept e declarations of the Board in these respects literly and at full face value. In agreeing with its positiowe do so upon an acceptance of its concern for the cefficated carriers and its purpose to protect them. We beve this is required by the general scheme of the stat.

The real controversy, then, upon the present point is not whether the Board may or may not unduly impinge upon the certificated system by use of the exemption power but whether it has in fact done so. Petitioners urge that ten flights per month between any pair of points upon a regularly scheduled basis are an obvious impingement upon the certificated carrier serving those points. The Board did three things in this respect. It found, upon the basis of the evidence, that such impingement would not be likely to occur. It next announced that it would not permit combinations or collusions between the supplemental carriers which might in total adversely affect the certificated carriers. And, thirdly, as we have already said, it announced that if the results proved different from its anticipations it would revise the order to eliminate the adverse effects.

We think we could not superimpose our judgment upon that of the Board upon such an issue, even if we had a judgment different from that of the Board. Experience alone will demonstrate the true answer. The Board's expert opinion is that the system it has devised, with its terms and limitations, will not seriously conflict with the interests of the certificated carriers. And it goes further and says it will insure that such conflict does not ensue.

In sum it seems to us that the judgment of the Board, that an air service supplemental to the certificated services is in the public interest, is a rational judgment and one which we must accept; that the finding of the Board that its proposed supplemental service will not result in adverse economic effects upon the certificated system is a conclusion which the Board is entitled to draw if the record supports it with evidence; and that the assurance of the Board that it will not hereafter permit adverse economic effects to jeopardize the certificated system or to pose a substantial threat to it, should be accepted and respected by this court. Having reached that point we then conclude that if the Board makes the required find-

ings as to undue burden, its present plan for a supplemental air carriage, affecting no excessive impact upon the certificated system, would be within the statutory exemption power (*i.e.*, Section 416(b)).

The second main point urged by petitioners is that the Board failed to make the findings required by the statute to support the exemption under Section 416(b). That section, as we have already noted, requires that the Board find "that the enforcement of this title or such provision, or such rule, regulation, term, condition, or limitation is or would be an undue burden on such air carrier or class of air carriers by reasons of the limited extent of, or unusual circumstances affecting, the operations of such air carrier or class of air carriers and is not in the public interest."

The exemption here involved is from the enforcement of the provision of the statute requiring certification. The question therefore is whether the requirement of certification would be an undue burden on this class of air carriers by reason of either the limited extent of air operations or unusual circumstances affecting their operations; and whether the requirement that this class of carriers be certified is not in the public interest. We find in the opinion of the Board a statement that "In these circumstances, very little purpose would be served by withholding the enlarged operating authority for what may be a lengthy period, and to do so would constitute an undue burden upon the applicants." But that statement does not support a conclusion that an exemption rather than a certification should be granted. It supports a conclusion only that some action should be taken promptly. We also find in the order a conclusion stated in the language of the statute, but the order contains no findings to support that conclusion. We have examined the opinion and the order with care, but we cannot ascertain from them what the Board deems to be the limited extent of the operations of the supplemental carriers

which would make a certification an undue burden on the carriers, nor can we determine what unusual circumstances affecting the operations of the supplemental carriers would make certification an undue burden on these carriers. Neither can we ascertain why the Board is of opinion that the certification of these supplemental carriers is not in the public interest.

We think the Board must make findings in the foregoing respects in order that the court, in the exercise of its review function, may determine whether the grant of the exemption is within the statutory authority of Section 416(b). It might be that the operating authority granted these carriers should be exempted from the requirement of Section 401(f) that the certificate specify the terminal points between which the carrier is authorized to engage in air transportation, or from the required specification of the service to be rendered. We do not know whether that is what the Board had in mind. But the question before us is not whether the supplemental carriers should be exempted from one or more of the subsidiary requirements of certification but whether they should be exempted from certification altogether. We repeat we cannot ascertain from the opinion or order what undue burden the Board thinks certification would be or why it thinks certification of this supplemental service would not be in the public interest. We are of opinion, therefore, that the case must be remanded in order that the Board may make findings to support the conclusions which the statute makes necessary to the exercise of the exemption power.

We are conscious of the fact that the operating authority issued under the order before us is an interim authority, to be effective only until the Board has concluded its consideration of the qualifications of the various applicants. If the Board had rested a finding of undue burden upon the fact that the interim for which this operating authority is issued is short, whereas the

remainder of a certification proceeding would be long, we would be close to the ruling of this court in the air mail case.[9] But we do not understand the Board to rest upon the temporary feature of the order. The purport of the discussion in the opinion of the Board is that the exemption power may be exercised to accomplish the permanent ends it has in mind for these supplemental carriers and does not depend upon or revolve about the temporary character of the exemption presently authorized.

The Board says no detailed findings are required, referring to the fact that this was a rule-making proceeding and relying upon our opinion in *Eastern Airlines* v. *Civil Aeronautics Board*.[10] But Section 416(b) itself requires that the Board shall find these conditions to exist, and it is clear that in order for the court to determine whether the Board acted within its statutory authority it must know what the Board finds. The *Eastern Airlines* case held only that Section 416(b)(1) does not require notice and full hearing and that the proceedings which occurred in that case were sufficient to comply with the procedural requirements of the statute.

In its brief the Board points to various subsidiary findings made by the examiners and adopted by the Board which are factual in respect to the supplemental carriers, such as comparisons between the new limitation and the old limitations in the irregular air carrier regulations, the overall financial resources and revenues of these carriers, the history of these carriers, the steady worsening in their position, and similar facts. But there is nothing to indicate upon what facts or findings the Board based its conclusion that a requirement of certification would be an undue burden upon these carriers.

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[9] American Airlines v. Civil Aeronautics Board, — U.S. App. D.C. —, 231 F.2d 483 (D.C.Cir. 1956).

[10] 87 U.S. App. D.C. 331, 185 F.2d 426 (1950), *vacated*, 341 U.S. 901, 95 L.Ed. 1341, 71 S.Ct. 613 (1951).

The opinion and the order leave us at a complete loss upon that subject.

We fully realize that the irregular carriers have been operating under exemption authority for many years, and it seems possible, if indeed not probable, that the Board has not heretofore stated its conclusions as to undue burden and public interest in any more extensive form that it does now. But until now these carriers have not operated with any semblance of regularity. They were truly irregular carriers, as they were called. Now they are to become supplemental carriers and no longer irregular. They are moved much closer to the certificated services. The burden of certification is no longer obvious. Moreover we are not referred to an adjudication of a challenge to the presence of an undue burden upon the irregular operation. There is now before us for adjudication a challenge to the burden asserted to exist upon supplemental operation. We think that, if the Board can institute a regular supplemental air service without certification and merely by exercising the exemption power, it may not do so without first clearly meeting the statutory prerequisites to the exercise of that power.

The Board demonstrated, as we have indicated in the first part of this opinion, that the supplemental carriers have a place in the national transportation system and that they should be authorized to operate. But the question now under consideration is whether they should be authorized by certificates, premised upon public convenience and necessity and specifying in some fashion the service which such carriers will be obligated to perform, or whether their operation may be authorized by a simple exemption from all the certification requirements of the statute. To validate an order of exemption the Board must comply with the statute; *i.e.*, it must find what the statute requires it to find, not in conclusory fashion in the statutory language but in such fashion that a reviewing court can test the validity of the finding.

The petitioners' third main point is that the order finally issued was not within the scope of the proceeding instituted by the Board's initial orders. We agree with the Board upon this point, basing that conclusion upon the view of the order here under review which we have heretofore described in this opinion.

The cases will be remanded for further proceedings.

APPENDIX B

The relevant provisions of the Civil Aeronautics Act of 1938 (52 Stat. 973), as amended (49 U.S.C. 401 *et seq.*), are:

* * * * *

Declaration of Policy

Sec. 2. In the exercise and performance of its powers and duties under this Act, the Authority [Board] shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity—

(a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate transportation by air carriers;

(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;

(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(e) The regulation of air commerce in such manner as to best promote its development and safety; and

(f) The encouragement and development of civil aeronautics.

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TITLE IV—AIR CARRIER ECONOMIC REGULATION

CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

Certificate Required

SEC. 401 (a) No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Authority [Board] authorizing such air carrier to engage in such transportation: *Provided*, That if an air carrier is engaged in such transportation on the date of the enactment of this Act, such air carrier may continue so to engage between the same terminal and intermediate points for one hundred and twenty days after said date, and thereafter until such time as the Authority [Board] shall pass upon an application for a certificate for such transportation if within said one hundred and twenty days such air carrier files such application as provided herein.

* * * * *

Terms and Conditions of Certificate

(f) Each certificate issued under this section shall specify the terminal points and intermediate points, if any, between which the air carrier is authorized to engage in air transportation and the service to be rendered; and there shall be attached to the exercise of the privileges granted by the certificate, or amendment

thereto, such reasonable terms, conditions, and limitations as the public interest may require. A certificate issued under this section to engage in foreign air transportation shall, insofar as the operation is to take place without the United States, designated the terminal and intermediate points only insofar as the Authority [Board] shall deem practicable, and otherwise shall designate only the general route or routes to be followed. Any air carrier holding a certificate for foreign air transportation shall be authorized to handle and transport mail of countries other than the United States. No term, condition, or limitation of a certificate shall restrict the right of an air carrier to add to or change schedules, equipment, accomodations, and facilities for performing the authorized transportation and service as the development of the business and the demands of the public shall require. No air carrier shall be deemed to have violated any term, condition, or limitation of its certificate by landing or taking off during an emergency at a point not named in its certificate or by operating in an emergency under regulations which may be prescribed by the Authority [Board], between terminal and intermediate points other than those specified in its certificate. Any air carrier may make charter trips or perform any other special service, without regard to the points named in its certificate, under regulations prescribed by the Authority [Board].

* * * * *

CLASSIFICATION AND EXEMPTION OF CARRIERS

Classification

SEC. 416 (a) The authority [Board] may from time to time establish such just and reasonable classifications of groups of air carriers for the purposes of this title as the nature of the services performed by such air carriers shall require; and such just and reasonable

rules, and regulations, pursuant to and consistent with the provisions of this title, to be observed by each such class or group, as the Authority [Board] finds necessary in the public interest.

Exemptions

(b) (1) The Authority [Board], from time to time and to the extent necessary, may (except as provided in paragraph (2) of this subsection) exempt from the requirements of this title or any provision thereof, or any rule, regulation, term, condition, or limitation prescribed thereunder, any air carrier or class of air carriers, if it finds that the enforcement of this title or such provision, or such rule, regulation, term, condition, or limitation is or would be an undue burden on such air carrier or class of air carriers by reason of the limited extent of, or unusual circumstances affecting, the operations of such air carrier or class of air carriers and is not in the public interest.

(2) The Authority [Board] shall not exempt any air carrier from any provision of subsection (1) of section 401 of this title, except that (A) any air carrier not engaged in scheduled air transportation, and (B), to the extent that the operations of such air carrier are conducted during daylight hours, any air carrier engaged in scheduled air transportation, may be exempted from the provisions of paragraphs (1) and (2) of such subsection if the Authority [Board] finds, after notice and hearing, that, by reason of the limited extent of, or unusual circumstances affecting, the operation of any such air carrier, the enforcement of such paragraphs is or would be such an undue burden on such air carrier as to obstruct its development and prevent it from beginning or continuing operations, and that the exemption of such air carrier from such paragraphs would not adversely affect the public interest: *Provided,* That nothing in this subsection shall be deemed to authorize

the Authority [Board] to exempt any air carrier from any requirement of this title, or any provision thereof, or any rule, regulation, term, condition, or limitation prescribed thereunder which provides for maximum flying hours for pilots or co-pilots.

* * * * *

JUDICIAL REVIEW OF AUTHORITY'S [BOARD'S] ORDERS

Orders of Authority [Board] Subject to Review

SEC. 1006 (a) Any order, affirmative or negative, issued by the Authority [Board] under this Act, except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 801 of this Act, shall be subject to review by the courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order. After the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore.

* * * * *

Findings of Fact by Authority [Board] Conclusive

(e) The findings of facts by the Authority [Board], is supported by substantial evidence, shall be conclusive. No objection to an order of the Authority [Board] shall be considered by the court unless such objection shall have been urged before the Authority [Board] or, if it was not so urged, unless there were reasonable grounds for failure to do so.

* * * * *